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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KHURSHED MAZHAR, DAVID M. NADALIN, and
KEVIN P. LARKIN

Appeal 2009-003140
Application 09/411,171
Technology Center 2100

Decided: October 30, 2009

Before JEAN R. HOMERE, STEPHEN C. SIU, and
ST. JOHN COURTENAY III, *Administrative Patent Judges*.

COURTENAY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 22-42. Claims 1-21 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

STATEMENT OF THE CASE

INVENTION

The invention on appeal is directed generally to the field of utilizing Internet sources of streaming-media content on a computer. More particularly, the invention relates to client/server architectures and graphical user interfaces for toolbars and explorer bars utilized in conjunction with Web browsers providing streaming-media content. (Spec. 1).

ILLUSTRATIVE CLAIM

22. A computer system having a display device for rendering a graphical user interface of a Web browser displaying Web page content in a browser pane, and having at least one speaker for playing streaming media, the graphical user interface of the Web browser comprising:
 - a) a radio toolbar displaying radio-toolbar buttons for controlling the streaming media irrespective of the Web page content being browsed, the radio-toolbar buttons including:
 - i) a play/stop button enabled to toggle between play and stop to control, respectively, playing and stopping of available streaming media, and disabled when streaming media is unavailable;
 - ii) a mute button for instructing the Web browser to silence streaming media, the mute button assuming an inactive state if the computer system cannot modify volume and an active state otherwise;
 - iii) a volume slider for controlling the volume of streaming media played over the speaker, the volume slider assuming an inactive state if the computer system cannot modify volume and an active state otherwise;

- iv) a radio-stations button selectable to alter a source of streaming media by providing a drop-down list that includes an "add station to favorites" entry and a list of recently used radio stations; and
- v) an information area displaying a status text component and a status icon component, the status text component presenting meta data information associated with a streaming media source, the status icon component presenting an Internet connection status regarding the streaming media source; and

b) a cursor controllable by a user to select the radio-toolbar buttons, the cursor configured to highlight a radio-toolbar button while passing over that radio-toolbar button and to display a rollover tool tip describing a corresponding function of the highlighted radio-toolbar button.

PRIOR ART

The Examiner relies upon the following references as evidence:

Realplayer G2 TM @ 1998. pp. 1-2. (hereinafter "RealPlayer").

"Realnetworks Ships Final Release of Realsystem G2, Next Generation Media Delivery System" (Nov 13, 1998), pp. 1-3 (hereinafter "Press Release").

THE REJECTIONS

The Examiner rejected claims 22-42 under 35 U.S.C. § 103(a) as being unpatentable over the combination of RealPlayer and Press Release.

PRINCIPLES OF LAW

"What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 419 (2007). To be nonobvious, an

improvement must be “more than the predictable use of prior art elements according to their established functions.” *Id.* at 417.

Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent . . . unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention.

Dunbar v. Myers, 94 U.S. 187, 197 (1876) (citing *Hotchkiss v. Greenwood*, 52 U.S. 248, 267 (1850)) (*Hotchkiss v. Greenwood* was cited with approval by the Supreme Court in *KSR*, 550 U.S. at 406, 415, 427).

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner’s position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006). Therefore, we look to Appellants’ Briefs to show error in the Examiner’s proffered prima facie case.

ISSUE 1 (claims 29-42)

Regarding claims 29-42, Appellants contend that the Examiner has not established a prima facie case of obviousness in rejecting claims 29-42 over the proffered combination of RealPlayer and Press Release (App. Br. 15-16). In particular, Appellants point out that in the Answer the Examiner merely rejects these claims by stating: as “claims 29-42 are analyzed as previously discussed with respect to claims 22-28.” (App. Br. 16; *see also* Ans. 6). Since this statement is the sole basis for rejecting claims 22-28, Appellants contend that the Office has failed to consider numerous elements or features in claims 29-42. Appellants list certain claimed features as not being addressed by the Office Action on pages 16-19 of the Brief.

In the “Response to Argument” portion of the Answer, the Examiner addresses Appellants’ arguments regarding the limitations alleged as not being taught or suggested by the proffered combination of RealPlayer and Press Release. (Ans. 6-9).

Issue 1: Have Appellants shown that the Examiner has not established a prima facie case of obviousness in rejecting claims 29-42 over the proffered combination of RealPlayer and Press Release?

ANALYSIS - ISSUE 1 (claims 29-42)

We decide the question of whether Appellants have shown the Examiner has not established a prima facie case of obviousness in rejecting claims 29-42 over the proffered combination of RealPlayer and Press Release.

We note that Appellant’s arguments regarding claims 29-42 do not attempt to distinguish the listed limitations over the Examiner’s proffered combination of RealPlayer and Press Release. Instead, Appellants merely assert: (1) that the Examiner has not established a prima facie case, and (2) Appellants merely recite selected features of claims 29-42. (App. Br. 15-20).

The record indicates that the Examiner addressed Appellants’ arguments with the detailed response on pages 6-9 of the Answer. However, the record also shows that Appellants have not rebutted any of the Examiner’s responsive arguments by filing a Reply Brief.

Based on this record, it is our view that Appellants have been given full and fair notice of the teachings of the RealPlayer and Press Release references, as further clarified by the Examiner in the “Response to

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Argument” section of the Answer (*See* Ans. 6-9). Appellants are responsible for all that is disclosed by the collective teachings of the cited references.

See In re Zenitz, 333 F.2d 924, 926 (CCPA 1964). “They are part of the literature of the art, relevant for all they contain.” *In re Heck*, 699 F.2d 1331, 1333 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009 (CCPA 1968)).

Based on the record before us, we find Appellants have failed to rebut the Examiner’s rejection of claims 29-42 with any persuasive analysis. It is our view that Appellants’ assertions are ineffective in demonstrating error in the Examiner’s prima facie case to establish the patentability of the claims on appeal. (App. Br. 15-20). *See Ex parte Belinne*, No. 2009-004693, slip op. at 7-8 (BPAI Aug. 10, 2009) (informative), *available at* <http://www.uspto.gov/web/offices/dcom/bpai/its/fd09004693.pdf>

Moreover, a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the reference does not comply with the requirements of 37 C.F.R. § 1.111(b). Likewise, a statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. *See* 37 C.F.R. § 41.37(c)(1)(vii).

For at least the aforementioned reasons, we find Appellants have not sustained the requisite burden on appeal of providing arguments or evidence persuasive of error in the Examiner’s rejection of claims 29-42.

ISSUE 2 (claims 22-28)

Regarding independent claim 22, Appellants contend that the RealPlayer does not have all of the necessary capabilities of a web browser

(App. Br. 21, ¶ 3). Appellants aver that “Press Release appears to distinguish the RealPlayer application from a web browser; and that the viewing pane of the RealPlayer application is linked to the media being played, and it is incapable of displaying a web page as described in the Application and as recited in independent claim 22.” (*Id.*).

In response, the Examiner notes that “RealPlayer G2” is a program that accesses audio and video files from the World Wide Web. (Ans. 11, ¶2). Thus, the Examiner finds that “RealPlayer G2” is a web browser that reads and processes hyperlinks to get to the appropriate site. (*Id.*)

Issue 2: Have Appellants shown that the Examiner erred in finding that “RealPlayer G2” teaches or suggests a web browser, as claimed? (Claim 22).

FINDINGS OF FACT

In our analysis *infra*, we rely on the following findings of fact (FF):

1. RealPlayer G2 connects to a web site and has a graphical user interface, as shown. (RealPlayer 1).
2. RealPlayer G2 displays information retrieved from the World Wide Web (audio and video) in the right half of the screenshot. (RealPlayer 1).
3. Press Release teaches: “RealChannels - There are more than 70 Realchannels™ built into RealPlayer G2, including major brands such as CNN, ESPN, and the Wall Street Journal.” (Press Release 2).

ANALYSIS - ISSUE 2 (claims 22-28)

We decide the question of whether Appellants have shown the Examiner has erred in finding that “RealPlayer G2” teaches or suggests a web browser, as claimed. (Representative claim 22). Based on Appellants’ arguments in the Appeal Brief, we will decide the appeal of claims 23-28 on the basis of representative claim 22. *See* 37 C.F.R. § 41.37(c)(1)(vii).

During prosecution, “the PTO gives claims their ‘broadest reasonable interpretation.’” *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)).

When we look to Appellants’ Specification for *context*, we note that a “web browser” is described as follows:

A Web browser is a client application, software component, or operating system utility that communicates with server computers via FTP, HTTP, and Gopher protocols. Web browsers receive Web documents (*i.e.* Web pages) from the network and present them to a user. Internet Explorer, available from Microsoft Corporation, of Redmond, Washington, is an example of a popular Web browser.
(Spec. 2, ll. 7-11).

Consistent with Appellants’ Specification, we broadly but reasonably construe the recited “web browser” as a *client application or software component that communicates with a server*. Given this construction, we find the scope of Appellants’ claimed “web browser” broadly encompasses the “RealPlayer G2” client application that connects to a web site (server) and has a graphical user interface (FF 1), where RealPlayer G2 also displays information retrieved from the World Wide Web (FF 2-3). Because we find

that the disclosed “RealPlayer G2” application is a *client application or software component that communicates with a server*, we agree with the Examiner’s position as articulated in the Answer (11).

Appellants also aver that the “RealPlayer does not disclose ‘streaming media irrespective of the Web page content being browsed.’” (App. Br. 29, § 3). We find this argument for patentability is predicated on nonfunctional descriptive material. The content of such nonfunctional descriptive material is not entitled to weight in the patentability analysis. *See Ex parte Nehls*, 88 USPQ2d 1883, 1887-1888 (BPAI 2008) (precedential) available at <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071823.pdf>.¹

For at least the aforementioned reasons, we find Appellants have not sustained the requisite burden on appeal of providing arguments or evidence persuasive of error in the Examiner’s rejection of representative claim 22 and claims 23-28 that fall therewith.

CONCLUSIONS

Based on the findings of facts and analysis above:

Appellants have not established the Examiner erred in rejecting claims 22-42 under 35 U.S.C. § 103(a) as being unpatentable over the combination of RealPlayer and Press Release.

¹ Cf. *In re Lowry*, 32 F.3d 1579, 1583 (Fed. Cir. 1994) (“Lowry does not claim merely the information content of a memory. . . . Nor does he seek to patent the content of information resident in a database.”). *See also Ex parte Curry*, 84 USPQ2d 1272 (BPAI 2005) (nonprecedential) (Fed. Cir. Appeal No. 2006-1003, aff’d Rule 36 Jun. 12, 2006); Manual of Patent Examining Procedure (MPEP) § 2106.01 (Eighth ed., Rev. 7, July 2008).

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DECISION

We affirm the Examiner's rejection of claims 22-42 under 35 U.S.C. §103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

pgc

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